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No. 803

IN THE

Supreme Court of the United States

October Term, 1948

UNITED STATES OF AMERICA, *Petitioner*

v.

25.406 ACRES OF LAND, MORE OR LESS, SITUATE IN ARLINGTON COUNTY, STATE OF VIRGINIA, and A. M. NEVIUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The District Court wrote a memorandum opinion (R. 101-105) [1] which has not been reported. The opinion of the Court of Appeals (R. 167-173) is reported at 172 F. 2d 990.

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[1] References to the appendices printed in the court below and bound together here will be designated "R". References to the typwritten transcript of record filed with the Court will be designated "T".

We shall ordinarily content ourselves here with illustrative rather than comprehensive citations to the record.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1949 (R. 174). The petition for writ of certiorari was filed on May 19, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Respondents showed that their land would have been used for a first-class, elevator apartment project, which was virtually ready to start construction when it was taken by the Government. The question is whether the District Court abused its discretion in allowing each of three of the expert witnesses to include the probable income to the land from this project as one element in his overall opinion as to value.

STATEMENT

The 25.406 acres of land here involved are commonly known as the "Nevius tract." It is directly across the Potomac River from the Lincoln Memorial. Parkland lies between the tract and the River, and Arlington Cemetery to the south; Lee Boulevard is on the north and sharply rising woodland on the west (R. 110, 116).

The tract was taken in June 1947 for a Veterans Administration hospital, and $850,827 deposited in the registry of the court as the estimated just compensation. The issue of just compensation was tried before a jury in February, 1948, and a verdict of $1,600,000 was returned (R. 105-106). The District Court, after briefs and argument, in May 1948 denied the Government's motion to set the verdict aside (R. 101-105), and the court below affirmed.

Every witness, for the Government and the appellees alike, agreed that the highest and best use of the Nevius tract was as a site for an elevator apartment house or apartment hotel project (e. g. R. 39, 112). It was the closest privately owned land to the Memorial Bridge and

is within a 5-10 minute trip of any point in downtown Washington (R. 20, 137, 153). The Potomac River lies before it and, across the River, there is an unobstructed view of the Mall. The immediate surroundings are unusually attractive (R. 67-68, 123-124). It has an abundance of light and air, permanently assured (R. 137, 143).

The tract is well-shaped, and large enough to permit maximum economy in construction and in operation, as well as free use of garden space (R. 67, 128). It is gently rolling, with underlying rock. No significant grading, drainage or piling would be necessary for construction. All utilities and sewers are already installed adjacent to the tract. (R. 20, 143, 154.)

The tract is zoned for 12 story apartment construction. Only one other tract, a markedly inferior site, in the Washington area has that advantage (R. 1, 144). It has unusual protection against a deterioration in its neighborhood, from the Government parklands which lie on two sides and from the ridge to the west (R. 125, 143-144).

There was no dispute by the Government of the respondents' testimony that this was not only the best apartment site in the County, but also in the entire area of Metropolitan Washington (R. 69, 127). Eken, who is probably the world's largest developer and builder of apartment projects, testified that, when he investigated the site for Equitable Life Assurance Company, "it was the finest site I had ever seen, and I still feel that today" (R. 143, 139-141, 144). The respondent's witnesses pointed out that there was an exceedingly large amount of investment capital anxious for just such an opportunity as that presented by the Nevius tract (R. 148, 158). This market, indeed, had twice produced an actual project for development of the site. The first project was ready to break ground when, on the day before Pearl Harbor, the Nevius tract was "lifted out of the Defense zone and priorities can-

celled'' (R. 162-163). The Government's petition is based upon the admission of evidence relating to the second project.

Brown, Wheelock, Harris & Stevens, one of the country's larger real estate and management firms (R. 130) in 1945 obtained a promise of financial cooperation from the President of the Equitable Life Assurance Company Society, and in 1946 developed plans for a first-class apartment house and apartment hotel on the site (R. 76). Architects' plans were prepared, Starrett Bros. & Eken engaged as builders, and the project planning completed (R. 77). The project would have involved an apartment hotel and eight elevator apartment buildings with a total of about 4,200 rooms (R. 49, 51). Equitable agreed to finance the project. All points of discussion between Equitable and the owners had been settled, except for one minor provision,[2] and construction could have started in 30 days, when the Government announced that it would take the property for a Veterans Hospital (R. 79-80, 146).

The appraisers for both parties encountered unusual difficulties in their preparation for trial because of the complete absence of the conventional evidence of sales of comparable properties (R. 21, 152). The witnesses for the Government sought the solution to their problem in taking Arlington sales and increasing those prices, through some unexplained process, to take account of the greater attractions of the Nevius tract. They placed chief reliance on a sale at 13.6 cents a foot and, altogether, they mentioned 12 sales of land, from 1941 to 1947 and at prices

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[2] Equitable proposed either of two types of financing: a $15,000,000 loan against the $17,000,000 cost; or construction by Equitable, after purchase of the site for a nominal figure, with lease of the completed project to the owners for 30 years at 6 per cent of cost and then for 20 years at 4 per cent. The owners chose the second alternative but proposed that the rental be reduced from 4 to 3 per cent in the last 20 year period (R. 78-79, 145-146).

from 8.6 to 47 cents a foot, as the basis of their 70, 72 and 75 cent valuation of the Nevius tract.[3]

Three of the witnesses for respondents — Babcock, Davis and Winston — included an estimate of the income attributable to the site as one element which they considered in reaching their overall opinion. Each explained very carefully that this was but one of many factors which he considered in reaching his opinion.[4] Each had made a very careful study of costs and returns (R. 51-54, 77-80, 87-89). Each is unusually expert in the field (R. 121-123, 130-133; T. 556-558). None testified to the capitalized land value indicated by his income estimates and none followed closely any capitalized value in reaching his over-all opinion.[5] The district court, in ruling this testimony admissible and in his charge to the jury, was careful to explain that the estimates of land income were not evidence but were simply to be accepted as specification of one of the reasons which led the expert witness to his final opinion as to value (R. 37, 88, 98; T. 311).

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[3] R. 5-6, 12, 15-18, 23, 25-27; T. 148-153, 186-188, 196, 205, 217-220, 225-6.

[4] Babcock enumerated some 11 factors (R. 41-48, 340-342) other than the probable yield of the land when developed according to plan (R. 48-55), which led to his opinion. Davis explained the three categories of factors — the features of the site, comparative prices, and the yield of the actual project proposed — which entered into his overall opinion (R. 66-67), and gave only brief attention to the question of yield (R. 79-80). Winston's testimony as to probable yield was expressly stated to be only one element in his opinion (R. 89), as it quite evidently was (R. 82-86, 152-158).

[5] Babcock would capitalize his $198,000 land income at 5% (R. 57), which would indicate a capitalized value of $3,960,000 as compared with his $3,500,000 to $4,000,000 appraisal (R. 41); Winston would capitalize his $240,000 at 5½%, indicating a land residual of $4,400,000 (R. 91) as compared to his $4,000,000 appraisal (R. 44A). Davis's appraisal of $5,500,000 to $6,600,000 (R. 66) compares with the $4,000,000 to $6,000,000 indicated by a capitalization of his $200,000 to $300,000 land income (R. 79-80).

The five Government witnesses testified to a value ranging from 70 and 75 cents a foot, or from $775,000 to $825,000 for the tract.[6] The seven witnesses for the respondent who testified to value gave figures ranging from $2.50 to $6.00 a foot, or from $2,800,000 to $6,600,000 for the tract.[7] The jury verdict was for $1.45 a foot or $1,600,000 for the tract. The court below commented that the jury "has probably done about what is right" (R. 173).

ARGUMENT

The Solicitor General urges, as reasons to grant the writ, that: (a) anticipated earnings from a prospective use of land are inadmissible; (b) expert witnesses may mention in support of their opinions only matters properly admissible in evidence; and (c) the decision below is in conflict with two decisions in other circuits. He makes only one oblique reference (Pet. 10) to the controlling feature of the decision below — the informed discretion exercised by the trial judge.

I

Every piece of real property is, in a strict sense, dissimilar from every other. Some, as the Nevius tract here in issue, are wholly unique. There cannot be any universal formula which will point unerringly either to "fair market value" or to "just compensation" in each of the myriad of particular cases which go to make up the law of eminent domain. Appraisal procedures which serve well for a suburban lot will not make equal sense for farmland, for industrial sites, and for wholly unique apartment housing sites.

The federal courts have often recognized that each condemnation case must turn largely upon its own facts. Spe-

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[6] R. 8, 20, 24, 27; T. 227.

[7] R. 41, 44, 66, 136, 137, 151, 152, 159.

cificially, income testimony should be admitted or excluded according as it is likely to aid or to distract the search for "fair market value," and the result should turn on the availability and reliability of other evidence as to value, on the probability of the assumed project having been under way had the Government not intervened, and on the reliability of the income estimates. See *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 396 (C. C. A. 2); *Orgel*, Valuation Under Eminent Domain (1936), secs. 169-173. No general formula can solve this equation; it can be answered only in terms of a sound judgment rooted in the facts of the particular case.

This, to a greater or lesser degree, is the case with most of the evidence issues which arise in eminent domain proceedings. The federal courts in recent years accordingly have developed a general rule that the admissibility of evidence in a condemnation case rests in the discretion of the trial judge, and his action will not be reversed on appeal except for abuse of that discretion.[8]

The issue here is simply whether Judge Hutcheson abused his discretion in allowing expert witnesses to include, as one element leading to their over-all opinion of value, a careful estimate of the income which the virtually certain project would have produced for the owners of the Nevius tract. That is an issue confined to the four corners of this case and bears only a verbal relationship,

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[8] *Union Electric L. & P. Co. v. Snyder Estate Co.*, 65 F. 2d 297, 304 (C. C. A. 8); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892, 895 (C. C. A. 8); *United States* v. *Becktold Co.*, 129 F. 2d 473, 479 (C. C. A. 8); *United States* v. *Wise*, 131 F. 2d 851, 852 (C. C. A. 4); *United States* v. *Savannah Shipyards*, 139 F. 2d 953, 956 (C. C. A. 5); *United States* v. *Prettyman*, 142 F. 2d 891, 893 (C. C. A. 4); *Foster* v. *United States*, 145 F. 2d 873, 875 (C. C. A. 8); *Clark* v. *United States*, 155 F. 2d 157, 161 (C. C. A. 8); *Bowie Lumber Co.* v. *United States*, 155 F. 2d 225, 229 (C. C. A. 5); *United States* v. *Block*, 160 F. 2d 604, 607 (C. C. A. 9).

for example, to the canal and farmland condemnations relied upon by the Government (*infra*, pp. 13-14)

The court below, in short, did not make the abstract ruling presented for review by the Solicitor General. It was deciding a particular case and not composing a treatise. It explicitly confined its ruling to the exercise by the trial judge of his discretion on the facts of this case. It said, to take one of many examples in its opinion (R. 171):

> "We do not mean to say, of course, that an expert witness should be allowed to roam at large in the realms of fancy and testify at length about hypothetical developments and mythical income to be realized therefrom. When this is attempted it should be firmly suppressed because of its tendency to mislead and confuse and the waste of time involved. Nothing of this sort, however, is involved here. The development as to which testimony was allowed was one which had been carefully planned in detail before the taking by the government and one which would have been carried out but for the taking. Surely there was no abuse of discretion in permitting the experts to go into this as one of the matters they had considered in fixing values.

We show below that, even if this case were one of general application, it was correctly decided. That discussion, however, indulges the artificial assumption of the petition that the ruling below is applicable in other cases to other projects under other plans for other lands. Since the court below plainly made no such ruling, our discussion will be presented as summarily as possible.

II

1. The analysis of the problem is simplified, and the Government's array of cases reduced in volume, when it is remembered that the admissibility of income evidence in

a Federal condemnation proceeding is rather plainly a question of Federal and not of state law.[9]

2. A good many of the authorities cited in the petition contain language supporting the Solicitor General's broad statements. If these generalizations were in truth the law, there would be a most unhappy conflict between the courtroom rules of evidence and both the practice of the market place and sound appraising theory. The evidence in this case shows without contradiction that the large investors who form the market for a site such as this would fix their price by consideration of only one factor: probable income (R. 139, 147-149). Without any exception known to us, every authoritative writer on the theory and practice of appraising real property states that, in the case of investment property such as this, the appraisal must rest chiefly upon the probable income which the tract could produce.[10] The United States Government itself, when it is appraising property rather than conducting a law suit, follows the same approach. *Federal Housing Administration*, Underwriting Manual, 1938, pars. 1306, 1312, 1323.

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[9] See *United States* v. *Miller*, 317 U. S. 369, 380; *United States* v. *Certain Parcels of Land*, 144 F. 2d 626, 628-629 (C. C. A. 3); *United States* v. *Certain Tracts of Land*, 57 F. Supp. 739, 740-742 (S. D. Cal.); *Westchester County Park Commission* v. *United States*, 143 F. 2d 688, 694 C. C. A. 2), cert. den., 323 U. S. 726; *United States* v. *25.88 Acres of Land*, 62 F. Supp. 726, 729 (E. D. N. Y.); *State of California* v. *United States*, 169 F. 2d 914, 918 (C. C. A. 9); *United States* v. *13,255.53 Acres of Land*, 158 F. 2d 874 (C. C. A. 3); *Kinter* v. *United States*, 156 F. 2d 5, 6 (C. C. A. 3); *State of Nebraska* v. *United States*, 164 F. 2d 866 (C. C. A. 8); *Comparet* v. *United States*, 164 F. 2d 452 (C. C. A. 10); *United States* v. *Certain Parcels of Land*, 54 F. Supp. 561, 562 (S. D. Cal.)

[10] Illustrative citations are *Babcock*, The Valuation of Real Estate (1932, 9th Printing) p. 165; see also pp. 139, 287-294; *McMichael*, Appraising Manual (1944, 3d Ed.) p. 89; see also, pp. 84, 89-99, 100-103; *American Institute of Banking*, Home Mortgage Lending (1938), p. 149; *Hoagland*, Real Estate Principles (1940), p. 180; *Kniskern*, Real Estate Appraisal and Valuation (1933), pp. 241, 247, 324.

The courts have not, in fact, been as blind to the realities of valuation as the Solocitor General's highly selective list of authorities would indicate. They have, instead, allowed the use of income testimony in either of two circumstances: when used as one element leading to the expert's over-all value opinion, or as direct evidence of value with respect to a project which with reasonable probability would have been undertaken had the property not been condemned. The testimony of which the Government complains was admissible here under either of the last two rules. The district court amalgamated the two into a stricter requirement, and permitted the expert witnesses to include the anticipated income as one reason leading to their value because the project was reasonably probable (R. 37, 98, 102-103; T. 311).

3. It is settled beyond any question that the expert witness may testify to the grounds of his opinion. *Wigmore,* Evidence (3d Ed., 1940), vol. II, sec. 562; vol. III, sec. 992; vol. VI, sec. 1720. As Chief Justice Marshall put it, "A witness ought never to swear to inferences without stating the train of reasoning by which his mind has been conducted to them." *The Nereide,* 9 Cranch 388, 417. As a necessary corollary of this rule, the expert witness may explain the grounds of his opinion even though they include matters which could not be admitted into evidence as direct testimony. *Wigmore, supra,* vol. II, sec. 655, citing many cases, and sec. 665b. "As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness." *Trans. Line* v. *Hope,* 95 U. S. 297, 298.

These general principles find full application in the cases dealing with testimony as to anticipated income from the condemned property. At least in the federal courts, even in circumstances where income testimony is inadmissible as direct proof of value, the anticipated income may nevertheless be used as one basis for the overall value judgment

of the expert witness.[11] Indeed, the Government itself was of this view five years ago,[12] and the Solicitor General points to no recent change in the law.

4. We have shown in the Statement (*supra*, p. 4) that the project was virtually certain of consummation had the Government not taken the land. While it is not always easy to pass certain judgment from the opinions on the actual degree of probability of the potential uses of the land, we believe that the decisions show remarkably consistent results if they be classified according as to whether the potential project was a reasonably probable or merely a remote and speculative use of the land.

The condemnation court, we agree, should not be distracted by evidence of expected income from a project where there was not a reasonable probability, at the time of condemnation, that it would soon have been under way. In such cases, the courts have excluded the evidence.[13]

The result, however, is different when the income testimony relates to a use of the land which was reasonably probable at the time of the taking. The courts in such

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[11] *United States* v. *3.544 Acres*, 147 F. 2d 596, 598-599 (C. C. A. 3); *Fain* v. *United States*, 145 F. 2d 956, 958 (C. C. A. 8); *Edward P. Allis Co.* v. *Columbia Mill Co.*, 65 Fed. 52, 57-58 (C. C. A. 8); *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5); *United States* v. *Certain Parcels of Land*, 145 F. 2d 374 (C. C. A. 3), aff'g 53 F. Supp. 472 (E. D. Pa.); *City of Philadelphia* v. *United States*, 53 F. Supp. 492 (E. D. Pa.); *United States* v. *Certain Lands in Town of Highlands*, 45 F. Supp. 126, 127-128 (S. D. N. Y.); see, also, *United States* v. *Delano Park Homes*, 146 F. 2d 473 (C. C. A. 2).

[12] See its Petition (pp. 9-10) and Brief (pp. 28-29) in *United States* v. *Waterhouse*, 321 U. S. 743, No. 209, Oct. Term, 1943.

[13] *Bank of Edenton* v. *United States*, 152 F. 2d 251, 253 (C. C. A. 4); *Polson Logging Co.* v. *United States*, 160 F. 2d 712, 717 (C. C. A. 9); *Gage* v. *Judson*, 111 Fed. 350, 356-359 (D. Conn.); *United States* v. *Certain Lands in Town of Highlands*, 45 F. Supp. 126, 127-128 (S. D. N. Y.); *United States* v. *Indian Creek Marble Co.*, 40 F. Supp. 811, 821 (E. D. Tenn.).

cases have allowed the owners of the condemned land to prove the probable income which they would have derived under rather well-developed plans for the subdivision of acreage and the sale or lease of lots,[14] for the operation of a farm,[15] for the construction and operation of an irrigation project,[16] for logging operations,[17] for the construction of hydro-projects,[18] and for the development of unproved oil and gas deposits.[19] Many of the courts, it is true, have indicated that on the facts of their cases this was very weak evidence. But the fact remains, where the project itself was reasonably probable, almost every case seems to have allowed, in one form or another, the proof of anticipated income.[20]

As we read the cases, then, the admissibility of direct evidence as to income from future projects depends upon

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[14] *United States* v. *Certain Parcels of Land*, 144 F. 2nd 626 (C. C. A. 3); *United States* v. *Waterhouse*, 132 F. 2d 699, aff'd by equally divided court, 321 U. S. 743.

[15] *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95, 100-102 (C. C. A. 6), cert. den. 309 U. S. 688.

[16] *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, 418-423 (C. C. A. 9).

[17] *Morton Butler Timber Co.* v. *United States*, 91 F. 2d 884, 890 (C. C. A. 6).

[18] *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297, 304 (C. C. A. 8); *United States* v. *Powelson*, 118 F. 2d 79 (C. C. A. 4), rev'd on other grounds, 319 U. S. 266.

[19] *Cal-Bay Corp.* v. *United States*, 169 F. 2d 15, 18-19 (C. C. A. 9), cert. den., No. 314, Oct. Term, 1948.

[20] Two cases, excluding income estimates of existing projects are a *fortiorari* exceptions to this generalization. *United States* v. *13.40 Acres of Land in City of Richmond*, 56 F. Supp. 535, 538-540 (N. D. Cal.) (quarry); *United States* v. *Davis*, 41 F. Supp. 595, 596 (E. D. Tenn.) (farm land). So, too, *United States* v. *5 Acres of Land*, 50 F. Supp. 69 (E. D. N. Y.) seems to be to the contrary. We discuss below (pp. 13-14) *United States* v. *Meyer*, 113 F. 2d 387, 397 (C. C. A. 7), cert. den., 311 U. S. 706, and *United States* v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1).

the probability of the project being put into operation had the land not been condemned. Our analysis thus turns back again to the inescapable fact that the valuation of real property must be done in terms of the particular property, and that the admissibility of evidence in a condemnation proceeding is more sensibly left to the discretion of the trial judge than to the black type of a text-book heading.

III

The Solicitor General seizes upon two of the several condemnation cases which on their own facts have excluded direct evidence of future income (see notes 13 and 20) and asserts their conflict with the decision below. Their dissimilarity from the present case emphasizes the procrustean character of his effort to fit decisions on individual facts into hornbook generalizations.

United States v. *Meyer*, 113 F. 2d 387, 397 (C. C. A. 7), cert. den. 311 U. S. 706, contains the broad statement quoted by the Solicitor General (Pet. 11). The opinion, directed almost entirely to other issues, contains no hint of the facts involved. The record shows, however, that the offered evidence consisted simply of a statement of the number of bushels of grain produced or expected to be produced per acre multiplied by the market value of the grain. No. 514, Oct. Term, 1940, R. 1062. The case bears no relation to that now before the Court.

United States v. *Boston, C. C. & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1) involved an even more remote valuation analogy and related to the Cape Cod Canal. There a witness for the owners testified as to the probable tonnage of the canal 5, 10, 20 and 30 years in the future and as to the probable rates which would be in effect at those dates. He appears to have testified only as to gross revenues. The Circuit Court of Appeals did not reverse, as the Solicitor General would have it, because it was wrong

to testify as to future income but because (271 Fed. at 886): (a) the jury could form its own judgment as to future tonnage without the aid of an expert, and (b) the rates were subject to government regulation and to assume an increase in tolls was a mere guess. The decision, at least as to its first ground, is startling but has no bearing on the question presented in the petition.

CONCLUSION

The decision of the court below is correct, and is confined to the facts of this case. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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